No. 12689

United States
Court of Appeals
for the Ninth Circuit

SHEFF WHITE, ORLAND WHITE and JOE M. WHITE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Apellee.

APPELLANTS PETITION FOR REHEARING

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Appeals from the United States District Court, for the District of Oregon.

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Claimants and appellants on the grounds following, petition for a rehearing of so much of the Court's opinion and judgment as holds: (1) that the contract between the defendant and the Irrigation District was not made for the benefit of appellants and (2) that the defendant was not liable because of the terms of the contract.

Discussing these points in the above order, we most respectfully urge that the contract between the defendant and the Irrigation District was made for the sole and exclusive benefit of the appellant landowners and that they are the real parties in interest, and the only parties who have a cause of action for a breach of the contract.

The contract involved is an agreement by defendant to store and deliver to plaintiffs (and other similar

water users) for one purpose only, to-wit: the irrigation of plaintiffs lands to which lands the water had become an appurtenance. The right to the use of the water belonged to the plaintiff and the defendant was merely a carrier for hire. (*Ickes vs. Fox* 200, U.S. 82, 57 S. Ct. 412) The Irrigation District named in the contract had no beneficial interest in the contract. It had no lands to irrigate and was limited by the law creating it to the purpose of acting as a vehicle, or agency, for the collection from the landowners of construction and operating charges, and transmitting the proceeds to the defendant in compensation for the services performed by the defendant.

The laws of the State of Oregon require, as a premise to a valid appropriation, that the water be seasonably put to a beneficial use. (In this case irrigation.)

Without the activity of the plaintiff in applying the water to a beneficial use, and thus effecting an appropriation, the defendant could not be allowed to store, divert or otherwise control the water.

It is quite apparent that the Irrigation District would have no cause of action for a shortage of water, because it was not a water user and could not be damaged.

In this respect, this case differs from *H. R. Mack Co. vs. Rensselaer Water Co.* 247 N.Y. 159, N.E. 896, cited by the Court. There it was suggested (P. 897 N.E. Cit) that the City had the primary interest:

> "for the benefit of the City in its corporate capacity, in which branch is included the service of the hydrants. * * The benefit, as it is sometimes said, must be one that is not merely incidental and secondary. * * It must be primary and immediate in such a cause and to such a degree as to bespeak the assumption of a duty to make reparation directly to the individual members of the public if the benefit is lost."

The distinction appears more clearly in the case of *German Alliance Ins. Co. vs. Home Water Supply Co.* 226 U.S. 220, 33 S. Ct. 32, where Justice Lamar pointed out the basis of liability of a water company which contracts to deliver water. We quote:

> "The courts have almost uniformly held that municipalities are not bound to furnish water for fire protection. Such was the unquestioned rule when they relied, as some still do, on wells and cisterns as a source of supply; nor was there any increase of liability with the gradual increase of facilities; though, with the introduction of reservoirs, standpipes, pumping stations, and steam engines, cities were frequently sued for damages resulting from an inadequate supply or insufficient pressure. But the city was under no legal obligation to furnish the water; and if it voluntarily undertook to do more than the law required, it did not thereby subject itself to a new or greater liability. It acted in a governmental capacity, and was no more responsible for failure in that respect than it would have been for failure to furnish adequate police protection."

There is another marked distinction between the class of contracts referred to in the Rensselaer case and the present contract, in that in the former the consideration comes from the general taxpayers of the municipality regardless of their benefit from the contract while here the only consideration comes directly from the land owners, who are the sole beneficiaries of the contract.

This distinction brings this case within the reasoning of a long line of Oregon cases on this point. *Section 1-301 O.C.L.A., Oregon Construction Co. vs. Allen Ditch Co.* 41 Or. 209, 59 Pac. 455; *Little Walla Walla Irr. Dist. vs. Preston,* 46 Oregon 5, 78 Pac. 982; *Nevada Ditch Co. vs. Pacific Livestock* Co. 63 Or. 363, 127 Pac. 984; *Caviness vs. La Grande Irr. Co.* 60 Or.

410, 119 Pac. 731; *Phez vs. Salem Fruit Union* 103 Or. 514, 20 Pac. 222 and especially within the doctrine of *Weinhard vs. R. R. Thompson Estate Co.* 242 Fed. 315, where Judge Wolverton refers to supporting Oregon decisions.

The Rensselaer case is further distinguished because of the rule found in the Restatement.

In *Restatement of the Law of Contracts*, Vol. 1, Sec. 145, we read:

> "BENEFICIARIES UNDER PROMISES TO THE UNITED STATES, A STATE, OR A MUNICIPALITY.
>
> A promisor bound to the United States or to a State or municipality by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation for the injurious consequences of performing or attempting to perform it, or of failing to do so, *unless*,
>
> (a) An intention is manifested in the contract, as interpreted in the light of the circumstances surrounding its formation, that the promisor shall compensate members of the public for such injurious consequences, or
>
> (b) *The promisor's contract is with a municipality to render services the non-performance of which would subject the municpality to a duty to pay damages to those injured thereby.*"

The Rensselaer case is contrary to the American Majority Rule found in *12 Am. Jur. 825*, Sec. 274, and the rule as stated in *17 Am. Jur. 839*, Sec. 286.

This unbroken line of authority points to the error in the court's holding that plaintiffs have no capacity to maintain this action.

We pass to the further holding of the Court that the defendant is protected by Section 44 of the Contract which protects the defendant from liability on account of drought, inaccuracy of distribution, or other causes, there may in time occur a shortage in the water supply for the lands of the District.

It is plaintiffs contention that this language does not apply to a failure to supply water because of a canal break. The rule of Ejusdem Generis would compel the "other causes" to fall within the class particularly enumerated that is, drought, or inaccuracies in distribution.

The words "other causes" being general terms, and following the specific words of "drought" and "inaccuracy of distribution" are to be construed as limited to causes of the same kind as are described by the special words. (*Hills vs. Joseph* 229 Fed. 865 (9th C.C.A.) *Koth vs. United States* 16 Fed. (2) 62 (9th C.C.A.))

While it is perfectly reasonable to assume that the contracting parties would agree that the defendant would not be liable for water shortage in case of a drought or the minor damage that would result from inaccuracies of distribution or other similar causes, it is not reasonable to assume that they are intended to release the defendant from *all other* causes of damages even to the extent of established negligence of the defendant.

The trial court's finding (Tr. 95) on the present record that defendant owed a duty to exercise reasonable care to deliver water seems to us as the proper interpretation of this particular provisions of the contract.

We respectfully contend that the foregoing authori-

ties justify a reconsideration of the court's opinion in construing the contractural relation between the parties, and the liability of the defendant in connection therewith.

Respectfully submitted,

P. J. GALLAGHER

MARTIN P. GALLAGHER

Attorneys for the Appellants.

CERTIFICATE

The foregoing Petition for rehearing in believed to be meritorious and is presented in good faith and not for the purpose of delay.

P. J. GALLAGHER

MARTIN P. GALLAGHER

Attorneys for the Petitioners.